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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION , et al.

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP, HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

THE BANK OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a bankruptcy court has authority to allow reimbursement of *postpetition* and *postconfirmation* attorneys' fees and costs to the secured holder of an "undersecured" claim based on an agreement allowing for the payment of attorneys' fees incurred in a reorganization proceeding.

2. Whether the application of the "Bankruptcy Rule", codified in 11 U.S.C. § 506(a), precludes allowing as an unsecured claim, with a priority superior to valid unsecured claims of "insiders", the demand of the secured holder of an undersecured claim for attorneys' fees and costs.

3. Whether the application of the "Reasonableness" Standard forbids the allowance of unitemized amounts of fees for services rendered by attorneys for a secured creditor in their pursuit of unsuccessful claims unrelated to the collection expenses provided for under an agreement with the debtor.

PARTIES TO THE PROCEEDINGS

Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation were Appellants before the United States Court of Appeals for the Eleventh Circuit. Each of the Petitioners separately filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, in the United States Bankruptcy Court for the Southern District of Florida.

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP") is a limited partnership formed in accordance with the laws of the State of Florida in 1979, consisting of forty (40) units of limited partnership interests, owned by twenty-five (25) separate persons, for the business purpose of engaging in the development of a mixed-use commercial real estate project in Miami, Florida, referred to as the "Miami Center."

Petitioner Holywell Corporation (hereinafter referred to as "Holywell"), incorporated in the State of Delaware in 1976, owns ten (10) of the units of MCLP's limited partnership interests and is the stockholder parent of Miami Center Corporation.

Petitioner Miami Center Corporation (hereinafter referred to as "MCC"), incorporated in the State of Florida in 1979, is MCLP's corporate general partner.

Petitioner Theodore B. Gould is a resident of Albemarle County in the Commonwealth of Virginia,

PARTIES TO THE PROCEEDINGS (Cont.)

Holywell's sole stockholder, and MCLP's individual general partner.

Petitioner Chopin Associates (hereinafter referred to as "Chopin"), a general partnership of MCC and Theodore B. Gould, formed in accordance with the laws of the State of Florida in 1979, leased certain land located in Miami, Florida, to MCLP for the development of the Miami Center in accordance with a Ground Lease Agreement, entered into in 1980.[1]

Respondent The Bank of New York, an Appellee below, was the interim construction lender for the development of the Miami Center, evidenced by various notes issued by Chopin Associates and the Miami Center Limited Partnership, secured by mortgages, providing for the reimbursement of attorney's fees and costs,[2] as follows:

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[1] The Ground Lease Agreement was reviewed and approved by The Bank of New York as the interim lender pursuant to tripartite buy-sell agreements between The Bank of New York, the financial institutions that had issued permanent loan commitments, and the borrowers. The Ground Lease Agreement's provisions subordinated The Bank of New York's liens to Chopin's fee and lessor interests as follows:

> "[T]he holder of any first mortgage . . . on the Lessee's leasehold estate hereunder and in any event any such mortgage . . . placed on the Lessor's fee estate in the leased premises shall be subject and subordinate to this lease. . . ."

[2] On December 19, 1984, The Bank of New York filed a Proof of Claim in each of the separate proceedings stating,

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

"If this note shall not be paid at maturity or according to the terms thereof . . . it may be placed in the hands of *an* attorney at law for *collection*, and in that event each party liable for the payment thereof . . . hereby agrees to pay the holder hereof in addition to the sums . . . stated, *a reasonable sum as an attorney's fee*, which shall include . . . attorney's fees incurred in any . . . bankruptcy, reorganization . . . including appellate proceedings, whether such proceedings arise before or after entry of a final judgment. It is also agreed that this contract shall be construed in all respects and enforced according to the *laws of the State of Florida.*" [Chopin Associates $23,000,000 Note issued to The Bank of New York on March 27, 1980; Miami Center Limited Partnership $47,500,000 Note and $42,000,000 Note issued to The Bank of New York on March 27, 1980][3] (Emphasis added)

(Continued from previous page)

pertinent to the case *sub judice*, that "costs and expenses . . . to the date of filing of the petition [were] in the approximate sum of $831,563.72" and

> "This claim does *not* include interest and attorneys fees and costs which accrue *after* the commencement of the case, the rights to which are expressly reserved." [Emphasis added]

[3] The original notes in the total principal amounts of $112,500,000 also contained the following "non-recourse" provisions:

> "The holder hereof agrees *not* to seek any deficiency judgment against the Borrower, or any member thereof, in any action to foreclose the Mortgage . . . and agrees that in the event that any suit is

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

"If this Note shall be *collected* by legal proceedings or through any court or shall be referred to *an attorney* because of any default, MCLP and Chopin jointly and severally agree to pay *attorney's* fees and court costs incurred by the Lender and any of the Lender's participants in connection therewith." [Various additional Notes issued by the Miami Center Limited Partnership and Chopin Associates to The Bank of New York from May 6, 1982 to December 21, 1983]

Respondent The Bank of New York filed a proposed amended consolidated plan of reorganization on behalf of the debtors in which the following pertinent statements were made:

"Article I, *DEFINITIONS, Claim:* Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence *on or as of their respective Petition Dates* as described in Section 101(4) of the Code." (Emphasis added)

"*BNY Debt:* The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin

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brought against the Borrower for . . . a money judgment, any judgment obtained in such a suit will be enforced *only* against (i) the Property, the accounts receivable, the contract rights and the rents, issues, profits, proceeds and income therefrom. . . ."

PARTIES TO THE PROCEEDINGS (Cont.)

in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985."

"Article II: *Substantive Consolidation:* . . . As a result of substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP. . . ."

"Article III, *CLASSIFICATION OF CLAIMS AND INTERESTS, Class* 2 – The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and *at the post-default contract rate thereafter, attorneys' fees, costs and expenses,* as provided in the documents evidencing such claims and *as authorized under applicable law,* as the same are allowed and ordered paid by the Court." (Emphasis added)

"Article IV, *MEANS FOR EXECUTION OF THE PLAN: Sale of Miami Center* – The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000. . . .The purchase price would be paid and applied in the following manner: (a) BNY would receive *a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date.* . . .Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell loan,[4]. . . .(Emphasis added)

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[4] On October 14, 1983, Petitioner Holywell Corporation made a $1,750,000 loan from the Bank of New York, secured by

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

> Upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released."
>
> "Article VI, *TREATMENT OF CLAIMS AND DISTRIBUTION*, . . . The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default *contract rate to the Miami Center Closing Date* shall be paid and satisfied in accordance with the provisions of Article IV hereof." (Emphasis added)

Fred Stanton Smith, appointed as Trustee of the Miami Center Liquidating Trust, for the purpose of carrying out the provisions of the amended consolidated plan of reorganization filed by the Bank of New York on behalf of the debtors, is an interested party.[5]

(Continued from previous page)

Theodore B. Gould's guarantee of repayment. Said note provided that in the event of default and nonpayment:

> "If this Note shall be *collected* by legal proceedings or through any court or shall be referred to an attorney because of any default, Borrower agrees to pay all *attorney's* fees and court costs incurred by the Lender in connection therewith."

[5] On October 10, 1985, in accordance with the provisions of the plan of reorganization, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, conveyed title of the Miami Center to the City National Bank of Miami, the Trustee under a certain land trust No. 5008793, pursuant to an Amended Contract of Sale. Fred Stanton Smith, having sought and obtained an indemnity holding him personally harmless for any claims " . . . as a result of the execution of the Contract

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

Other interested parties include the United States of America, the Commonwealth of Virginia, the Miami

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. . . or any other provision of the Plan," acquiesced in the Purchaser taking a credit on behalf of the Bank of New York for postpetition interest in the amount of *$27,050,115.02* as the secured holder of an undersecured claim, and also acquiesced in a postconfirmation modification of Article IV, *Means For Execution Of The Plan*, App. 40-41, without notice, hearing, or court approval, amending such provisions releasing the debtors jointly and severally from personal liability under the mortgages, security instruments, and notes secured thereby as follows:

> "Nothing herein contained shall release the Debtors from the following obligations and liabilities (the "Remaining Liabilities") and other collateral to secure such Remaining Liabilities"
>
> . . .
>
> 3. All expenses of the Releasor including, but not limited to, attorneys fees, consultant's fees and disbursements, as set forth in paragraph 4 of the Contract to the Miami Center Closing Date (as defined in the Contract).
>
> The Remaining Liabilities shall *continue to be personal obligations and liabilities of the Debtors*, payable from the Miami Center Liquidating Trust, until the same are paid or are discharged or released by separate written instrument or court order."

Paragraph 4 of the Amended Contract of Sale, October 10, 1985, states as follows:

> "Nothing herein contained shall be deemed to preclude or prohibit the Bank of New York, in accordance with the reservations contained in the Plan

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

Center Joint Venture, and corporate entities related to Petitioner Holywell Corporation and defined as "Affiliated Creditors" in the plan of reorganization filed by the Bank of New York on behalf of the debtors. The Plan's Article I, *Definitions*, defined "Affiliated Creditors" as including Parkwell, Inc., Orion Industries, Inc., Holywell Construction Company, Charleston Center Corporation, 1300 North 17th Street Associates, Eleven DuPont Circle Associates, Pietro Belluschi & Associates, Inc. ("PBA, Inc."), Holywell Management of Florida, Inc., Orion Engineering Services, Whitehall Building Services, Whitehall Security Corporation (Fla.), Holywell Telecommunications Company, and Holywell Leasing Company. The claims of "Affiliated Creditors" were subordinated as "insiders" to Class 8, based upon a process of classification.

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> and the adversary proceeding on the amount, priority and validity of the Bank's lien, from seeking and obtaining an allowance by the Court, and if allowed payment by the Seller of all of its costs, expenses and fees incurred in connection with its loans to Debtors and the Bankruptcy Proceedings."

Respondent The Bank of New York simultaneously granted the Miami Center Liquidating Trust a release, stating:

> "The Liquidating Trust shall have no liability and is released of any liability in connection with the Notes and Mortgages which constitute the Bank's mortgages and obligations for which said mortgages were executed."

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MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, THEODORE B. GOULD,
and HOLYWELL CORPORATION,

Petitioners,

v.

THE BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on September 5, 1989, denying the Petition for Rehearing and Suggestion of Rehearing In Banc upon that court's original opinion, entered on June 30, 1989.

OPINIONS BELOW

The judgment of the United States Court of Appeals, entered on September 20, 1989, is printed in the

Appendix attached hereto ("App") at App. 1. The order of the Eleventh Circuit Court of Appeals, entered on September 5, 1989, denying the Petition for Rehearing and Suggestion of Rehearing In Banc, is printed at App. 3. The Court of Appeals' original order, entered on June 30, 1989, is printed at App. 5.

The opinion of the district court, entered on June 30, 1988, affirming the bankruptcy court's Memorandum Decision on the amount of The Bank of New York's fees and expenses, is printed at App. 9.

The order of the district court, entered on September 7, 1988, denying the Motion for Rehearing concerning the issues of (a) whether a bankruptcy court has authority to allow the payment of *postpetition* and *postconfirmation* attorneys' fees as a general unsecured claim, (b) whether the allowance of attorneys' fees provided for in an agreement should have been *limited* to actual collection expenses under such an agreement, and (c) whether an unsecured claim for attorneys' fees should be accorded a priority *superior* to the claims of insiders, is printed at App. 7.

The bankruptcy court's "Memorandum Decision On Amount of Bank's Fees and Expenses," entered on March 11, 1987, is printed at App. 14. The bankruptcy court's original "Memorandum Decision On Estate's Liability for Bank's Fees and Expenses," denying The Bank of New York's application for the payment of attorneys' fees as an administrative expense, entered on November 5, 1986, is printed at App. 27.

Other opinions of the lower courts, which are related to the Court's consideration of this Petition, are printed in the Appendix and, where such opinions have been

reported, the citation is indicated in the Table of Contents to the Appendix.

STATEMENT OF JURISDICTION

Petitioners filed an appeal to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, denying a Motion For Rehearing and affirming the bankruptcy court's allowance of the reimbursement to The Bank of New York for attorneys' fees and costs for a period ending April 30, 1986, as an unsecured claim with a priority superior to valid insider claims, notwithstanding the prior finding in the bankruptcy court's Confirmation Order, entered on August 8, 1985, that The Bank of New York's claim was "undersecured," App. 33, and also its prior decision, entered on November 5, 1986, denying The Bank of New York's application for reimbursement of attorneys' fees and expenses as an administrative expense payable in accordance with 11 U.S.C. Section 503(b)(3) and (4), App. 27.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT STATUTORY PROVISIONS

The applicable provisions of the Bankruptcy Reform Act of 1978 are set forth in the Appendix hereto at page 73. In particular, this case involves the administration of the bankruptcy laws with respect to the following provisions of title 11:

11 U.S.C. Section 502(b) provides as follows:

"Except as provided in subsection (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after a notice and a

hearing, shall determine the amount of such claim in lawful currency of the United States *as of the date of the filing of the petition*, and shall allow such claim in such amount, except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) *such claim is for a debt that is unmatured on the date of the filing of the petition* and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

11 U.S.C. Section 503(b)(3) provides as follows:

"(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

11 U.S.C. Section 503(b)(4) provides as follows:

"(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;"

11 U.S.C. Section 506(a) provides as follows:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is *a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property,* or to the extent of the amount subject to setoff, as the case may be, *and is an unsecured claim to the extent that the value of such creditor's interest* or the amount so subject to setoff *is less than the amount of such allowed claim.* Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

11 U.S.C. Section 506(b) provides as follows:

"To the extent that an allowed secured claim is secured by property *the value of which,* after any recovery under subsection (c) of this section, *is greater than the amount of such claim,* there shall be allowed to the holder of such claim, interest on such claim, *and* any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

STATEMENT OF CASE

On August 22, 1984, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Holywell Corporation, and Theodore B. Gould [hereinafter referred to as "Petitioners"] each separately filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Reform Act of 1978, as amended, in resporse to the commencement of foreclosure proceeding related to the development of a commercial mixed-use real estate project referred to as the "Miami Center." The proceedings were assigned to Chief Bankruptcy Judge Thomas C. Britton of the United States Bankruptcy Court for the Southern District of Florida. Chief Bankruptcy Judge Britton was required to recuse himself from these proceedings on August 27, 1987, having engaged in an *ex parte* conference on May 15, 1987, in which he made comments expressing personal bias against Petitioner Theodore B. Gould and other related parties.

On August 8, 1985, the bankruptcy court entered an order confirming a plan of reorganization, proposed by The Bank of New York on behalf of the debtors, in which the following pertinent finding of fact was made:

> "[T]he Bank of New York, the major creditor whose claim is undersecured. . . ." App. 33

On November 5, 1986, a Memorandum Decision On Estate's Liability For Bank's Fees And Expenses, *denied* The Bank of New York's application for reimbursement of attorneys' fees and expenses in the total amount of *$1,855,458* as an *administrative* expense payable in accordance with 11 U.S.C. Section 503(b)(3) and (4). The bankruptcy court nevertheless concluded, in relevant part, as follows:

> "Although Section 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that *the unsecured claim is barred simply because it exceeds the value of the pledged collateral.* 3 Collier On Bankruptcy, Sec. 506.05 n. 5 (15th Ed. 1986)" [Emphasis added] App. 30.

On March 11, 1987, the following pertinent findings of fact and conclusions of law were made in the bankruptcy court's Memorandum Decision On Amount Of Bank's Fees And Expenses:

> "A precise count of *the actual time spent in unreasonable duplication is prevented here* because the applicants frequently included other services in the same time charge without a breakdown. . . ." [Emphasis added] App. 20.
>
> "The necessary and reasonable participation by the New York firm [Emmet, Marvin & Martin], which could not institute foreclosure and by more than one Miami firm during this phase was nominal." App. 19.
>
> "If the Bank preferred the comfort of consultive participation by more than one firm for each of the two distinct phases involved in the collection of its claim, it had every right to purchase such comfort. *It is not, however, entitled to recover that additional cost from this estate at the expense of other claimants.*"[1] [Emphasis added] App. 19.

The bankruptcy court, however, concluded as follows:

> "The Trustee argues that time spent by the Bank in defending appeals [*after* confirmation] and *in litigation involving non-bankrupt subsidiaries* of the debtors ought not to be included in the

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[1] Nonetheless, the bankruptcy court thereafter allowed the Bank of New York $490,840 for services rendered by Emmet, Marvin & Martin, representing forty-four (44) percent of the total award.

recoverable collection expenses. I disagree."[2] [Emphasis added] App. 22.

"I also reject the trustee's contention that fees paid since the fall of 1985 by a different entity, M. C. Holdings Partners, should not be considered for reimbursement." App. 22.

" . . . *it became necessary in this case for the Bank to pursue the assets of non-bankruptcy subsidiaries owned by the debtors and, therefore, assets subject to disposition under the Bank's plan.*[3] No party has

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[2] On June 23, 1983, Holywell Corporation entered into an Assignment And Security Agreement granting to The Bank of New York its right, title, and interest as "Stock Collateral" in the issued and outstanding shares of its wholly-owned subsidiaries as additional security for MCLP's performance in accordance with a certain Building Loan Agreement.

Article 8, *Remedies On Default*, of said Assignment And Security Agreement, *limited* The Bank of New York's authority as a secured party in the event of default to the *sale* of the "Stock Collateral," stating in relevant part as follows:

" . . . the Bank may immediately, without demand or performance and without notice of intention . . . sell at any time . . . at public or private sale . . . in the states of New York, Florida or elsewhere, . . . the whole or any part of the Collateral."

[3] See 28 U.S.C. Section 1334(d), which provides that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate. Also see *In re Unishops*, 494 F.2d 689, 690 (2nd Cir. 1974):

" . . . the bankruptcy court cannot expand its jurisdiction over a debtor's subsidiary absent a showing that the subsidiary is a mere sham rather than a viable entity.";

In re Beck Industries, Inc., 479 F.2d 410, 419 (2nd Cir. 1973):

"The corporate veil cannot be disregarded merely because it would make for an efficient and economical administration of the debtor's estate."

> shown me that New York law requires the exclusion . . . of these expenses."[4] [Emphasis added] App. 22.

The bankruptcy court allowed reimbursement of attorneys' fees to The Bank of New York (a) as a collection expense in an unspecified amount for undocumented prepetition services, (b) $243,953 for services rendered *after* confirmation and payment of The Bank of New York's allowed secured claim, and (c) unspecified fees for postpetition services rendered prior to the Plan's Effective Date of October 10, 1985.

On June 30, 1988, an Order Of Affirmance, App. 9, was entered on the bankruptcy court's Memorandum Decision On Estate's Liabilities For Fees And Expenses of November 5, 1987 ["the liability memorandum"], and the Memorandum Decision On Amount Of Bank's Fees And Expenses of March 11, 1987 [the "fee award memorandum"], in which the following pertinent finding of fact was made:

> "The liability memorandum determined that the Bank of New York would be allowed a general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the attorneys' fees incurred in the collection of loans to Holywell,[5] including fees incurred in the bankruptcy proceeding." App. 9-10.

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[4] 4 The bankruptcy court's reference to "New York law" was error. Although the loan documents provided that they are to be construed in terms of the laws of the State of Florida, the issue before the court concerned the administration of the bankruptcy laws.

[5] The district court erred in referring to Holywell Corporation as the borrower of the notes for which The Bank of New

(Continued on following page)

The district court thereupon made the following conclusions of law:

(Continued from previous page)

York had filed its Proof of Claim and application for the reimbursement of attorneys' fees. The notes issued were as follows:

> Note dated March 27, 1980, made by Chopin to The Bank of New York, in the principal amount of $23,000,000.
>
> Note dated March 27, 1980, made by MCLP to The Bank of New York, in the principal amount of $47,500,000.
>
> Note dated March 27, 1980, made by MCLP to The Bank of New York, in the principal amount of $42,000,000.
>
> Note dated May 26, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $24,000,000.
>
> Note dated as of August 27, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $11,000,000.
>
> Note dated December 2, 1982, made by MCLP and Chopin, in the principal amount of $8,000,000.
>
> Note dated December 9, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $10,000,000.
>
> Note dated January 20, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $8,000,000.
>
> Note dated June 23, 1983, made by MCLP and Chopin to The Bank of New York in the principal amount of $5,300,000.
>
> Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $12,525,419.83.

(Continued on following page)

"This liability was predicated on 506(a) which 'separates an undersecured creditor's claim into two parts: he has a secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*' Notes of Committee On The Judiciary, Senate Report 95-989 (emphasis added). The attorneys fees for collection of the debt are part of that claim."

"The Bank of New York has an allowable[3] claim inasmuch as it is based on a contractual right under the loan documents signed by the parties. While the issue has not been squarely addressed in this circuit, numerous decisions exist in other circuits allowing such claims.[4]

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[3] Appellant argues that the Supreme Court decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S.Ct. 626 (1988) holds that such awards are precluded under 11 U.S.C. Section 506(b). However the context of that case is completely inapposit [sic]. . . .

[4] The cases cited by Appellant Holywell Corporation do not support their proposition: their cited cases merely address the issue of whether a creditor seeking recovery under section 506(b) must be an oversecured creditor.

(Continued from previous page)

Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $1,800,957.96.

Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $87,874.33.

Note dated December 21, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $1,916,966.59.

On August 6, 1988, the district court denied, without hearing, the Appellants' Motion For Rehearing and Memorandum Of Law, filed on July 13, 1988, in which the Petitioners requested rehearing on the following three issues:

> "1. The Bank's unsecured fee claim cannot include postpetition attorneys' fees.
>
> 2. The Bank's unsecured claim cannot include fees incurred in matters not necessary to enforcement of its contract rights.
>
> 3. There is no legal basis for according the Bank's claim a priority ahead of the claims of insiders."

On June 30, 1989, a panel of the Eleventh Circuit Court of Appeals, consisting of Circuit Judges Fay and Hatchett, and Senior District Judge Walter Hoffman, entered an opinion, App. 5, affirming the judgment of the district court below for the reasons stated in and based upon the memorandum decisions of the bankruptcy court and the order of the district court affirming those decisions.

REASONS FOR GRANTING THE WRIT

I. Attorneys' Fees And Costs Provided For Under An Agreement Are Not Allowable To A Secured Holder Of An "Undersecured" Claim.

In *Blum v. Stenson*, 465 U.S. 886, 896 (1984), this Court's opinion stated that "[w]here, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."

(a) The bankruptcy court's Memorandum Decision allowing total recoverable fees of $1,126,824 and costs of

$84,670, as an unsecured claim to The Bank of New York as the secured holder of an "undersecured" claim, is directly inconsistent with the Bankruptcy Code and the confirmed Plan's provisions.

If an objection is made to a claim, Section 502(b) provides, in relevant part, as follows:

> "The court . . . shall determine the amount of such claim . . . as of *the date of the filing of the petition* and shall allow such claim in such amount except to the extent . . . (5) *such claim is for a debt that is unmatured* on the date of the filing of the petition. . . ." (Emphasis added)

The bankruptcy court's award of attorneys' fees, is for the period from June 9, 1983,[6] to April 30, 1986.

---

[6] Article III, *Classification Of Claims And Interests*, precludes the payment of *predefault* attorneys' fees in the amount of $132,253, for the period prior to February 1, 1984, no documentation of the predefault services having been rendered, the Plan providing in relevant part as follows:

> "*Class 2* – The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court."

No application was made for and no documentation was provided to substantiate a "computational error" in the amount of $334,920.87. The doctrine of equitable estoppel precluded The Bank of New York from claiming compensation for such computational error, having failed to revise its Fee And Expense Application and having stated that "It should be noted that the Bank is *not* seeking an increase in the amount of fees and expenses allowed by reason of such oversight or computation errors." [T. F. Noone, "Affidavit In Connection For Allowance Of Attorneys' Fees, Costs . . . Incurred By The Bank of New York," January 13, 1987, pp. 2-3]

However, the Bankruptcy Code and the confirmed Plan's provisions *limit* the court's authority to the allowance of a claim as of the date of the filing. In the instant case, the bankruptcy court was required to determine the amount of The Bank of New York's claim for the reimbursement of attorneys' fees as of August 22, 1984, the date of filing of the petitions. This it never did.

Section 503(b)(2) allows compensation and reimbursement under Section 330(a) to attorneys employed as professional persons under Section 327 or 1103 or to the debtor's attorney for the actual, necessary costs and expenses of preserving the estate, App. 74. Section 503(b)(4) limits reimbursement to a creditor to the reasonable compensation for professional services rendered by an attorney to an entity whose expense is allowable under paragraph (3) of that subsection. App. 75. The Bank of New York was not such an "entity." None of the provisions of Section 503(b)(3) are applicable to the reimbursement of The Bank of New York's attorneys' fees in an *unspecified* amount for the period from August 22, 1984, to October 10, 1985. The bankruptcy court's Memorandum Decision On Estate's Liability For Bank's Fees And Expenses *denied* The Bank of New York's application for the payment of attorneys' fees as an administrative expense under Section 503.[7]

---

[7] On September 27, 1985, the bankruptcy court entered an order requiring that application for all administrative claims be filed no later than October 17, 1985 [C.P. 1014]. The Bank of New York first filed its application on June 13, 1986, requesting that the bankruptcy court authorize reasonable compensation for its attorneys to the extent that the Bank, through its attorneys, made a "substantial contribution benefitting the estate in accordance with Section 503(b)(3) and (4)."

The reimbursement to a creditor as an *unsecured* claim for postpetition attorneys' fees for the period from August 22, 1984, to October 10, 1985, is inconsistent with statutory requirements of Section 503, precluding compensation and reimbursement of attorneys' fees for creditors *except* under subsections (3) and (4).

The reimbursement of attorneys' fees in the amount of $243,953 as a collection expense for services rendered by attorneys *after* confirmation and the full payment of The Bank of New York's allowed secured claim is inconsistent with statutory requirements of Section 1141(a), which provides that the "confirmed plan bind[s] the debtor . . . any entity acquiring property under the plan, and any creditor . . . " Furthermore, the reimbursement of attorneys' fees to a creditor as an allowed unsecured claim for services rendered after the effect of confirmation, is inconsistent with subsection (c) of section 1141, which states that " . . . except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . ."[8]

(b) This Court's analysis of the meaning of 11 U.S.C. Section 506 in *The United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1029-1031 (1989), is applicable to a determination of whether attorneys' fees and costs are reimbursable to the secured holder of an undersecured claim:

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[8] The confirmed Plan's Article IV, *Means For Execution Of The Plan*, limits the reimbursement of expenses, stating:

> "BNY would receive a credit for the amount of the BNY Debt plus expenses *to* the Miami Center Closing Date [October 10, 1985]." (Emphasis added) App. 39.

> "Section 506, [footnote omitted] . . . governs the definition and treatment of secured claims. . . . Subsection (a) of Section 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured. [footnote omitted] Subsection (b) is concerned specifically with oversecured claims . . . .Section 506(b) allows a holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, 'interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'. . . .[T]*he phrase 'interest on such claim' stands independent of the language that follows.* 'Interest on such claim' is not part of the list made up of 'fees, costs or charges,' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well. [citation omitted. . . .*By the plain language of the statute, the two types of recovery are distinct.* [footnote omitted]" (Emphasis added) 109 S.Ct. at 1029-1031.

Thus, subsection (b) of Section 506 allows for the payment of any reasonable postpetition fees and costs provided for under the agreement under which such claim arose *only* to such extent that an allowed claim is secured by property the value of which is greater than the amount of such claim. In the present case, the "non-recourse" provisions of the notes in the amount of $23,000,000, $42,000,000, and $47,500,000 precluded The Bank of New York from seeking recovery of collection expenses for attorneys' fees, except against "the Property, accounts receivable, the contract rights and the rents, issues, profits, proceeds and income therefrom."

This Court's analysis in *United Savings Association of Texas v. Timbers of Inwood Forest*, 108 S.Ct. 626, 630 (1988), of the substantive effect of subsection (b) of section 506

permitting "postpetition interest to be paid only out of the *'security cushion,'* [an] undersecured creditor, who has no such cushion, falls within the general rule *disallowing* postpetition interest," (emphasis added) is applicable to the reimbursement of any reasonable postpetition fees and costs provided for under the agreement from which such claim arose.

It does not make common sense to conclude that it was the intent of Congress to *disallow* the payment of postpetition interest on an undersecured claim and allow the payment of attorneys' fees and costs on such claims *prior* to the payment at least of the principal of *all* unsecured claims.

II. The Allowed Unsecured Claim For Attorneys' Fees And Costs Of A Secured Holder Does Not Have A Priority Superior To Valid Undisputed Claims Of Insiders.

The equitable principle of denying the secured holder of an undersecured claim the right to recover postpetition interest prior to the payment of the principal of a valid unsecured creditor's claim is also applicable to the attorneys' fees and costs of an undersecured creditor:

> "Section 506(b)'s denial of postpetition interest to undersecured creditors merely codified pre-Code bankruptcy law, in which that *denial was part of the conscious allocation of reorganization benefits and losses between undersecured and unsecured creditors.* 'To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors.' *Vandston Bondholders Protection Committee v. Green,* 329 U.S. 156, 164 (1946). It was considered *unfair* to allow an undersecured creditor to recover interest from the estate's unencumbered assets before

> unsecured creditors had recovered any principal." (Emphasis added) 108 S.Ct. at 631.

Section 506(a) codifies the pre-Code "Bankruptcy Rule" permitting a " . . . secured creditor to receive dividends along with the general creditors only on the balance remaining after the value of the security has been determined and deducted from the claim." *United States National Bank, et al. v. Chase National Bank, et al.*, 331 U.S. 28, 34 (1947). Thus, this Court has concluded as follows:

> " . . . an undersecured creditor is entitled to *'surrender or waive his security and prove his entire claim as an unsecured one.'* [citation omitted] Section 726(a)(5) therefore requires no more than that undersecured creditors receive postpetition interest from a solvent debtor *on equal terms with unsecured creditors* rather than ahead of them. . . ." (Emphasis added) 108 S.Ct. at 634.

Since this Court's precedent *only* grants the holder of an undersecured claim the alternative right to "waive his security and prove his entire claim" on an unsecured basis, an undersecured creditor is entitled to receive reasonable postpetition fees and costs on such claim from a solvent debtor *only* on equal terms with all unsecured creditors, including the valid allowed unsecured claims of insiders.[9]

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[9] See 11 U.S.C. Section 510(c); S.D. Fla., *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York*, No. 85-3230-Civ-Atkins, March 24, 1987, *reversed* the bankruptcy court's Confirmation Order, as amended *nunc pro tunc* on November 10, 1986, concluding that the plan wrongfully subordinated MCJV's claim, and, thus, that the plan was unfair and inequitable. The district court concluded that the amended consolidated plan of reorganization proposed by The Bank of New York on behalf of the debtors did not satisfy 11 U.S.C. Section 1129(b)(l) [" . . . the insider label is *not* sufficient,

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In the present case, The Bank of New York did not waive its security and prove its entire prepetition claim on an unsecured basis, rather *only* its claim for reimbursement of attorneys' fees, costs, and loan expenses. The Bank of New York asserted that its secured claim *included* unmatured interest and expenses from the date of commencement of the proceedings to the "Miami Center Closing Date." *Art. IV* of the Plan, App. 39.

As a matter of law, the contractual documents, and the Plan's provisions, The Bank of New York's unsecured claim for the reimbursement of attorneys' fees and costs as a collection expense must be limited to the "reasonable" fees and costs of *an* attorney, licensed to practice in the State of Florida, for the period from the declaration of a notice of default on February 1, 1984, to the date of the commencement of the proceedings on August 22, 1984.

III. The "Reasonableness" Standard Precludes The Reimbursement Of Fees In An Unspecified Amount For Services Rendered By Attorneys On Unsuccessful Claims.

(a) This Court's analysis of the "Reasonableness" Standard in *Blum v. Stenson* as applied to the allowance of attorneys' fees stated, in relevant part, as follows:

> " 'Results obtained' is one of the 12 factors identified in *Johnson v. Georgia Highway Express*, 488

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in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors."]; *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977); and *In re U.S. Truck Co.*, 800 F.2d 581 (6th Cir. 1986).

> F.2d, at 718, as relevant to the calculation of a reasonable attorney's fee. It is 'particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.' *Hensley, supra,* at 434 (fee award must be reduced by the number of hours spent on unsuccessful claims)." 465 U.S. at 900.

The "Reasonableness" Standard set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, at 717-719 (5th Cir. 1984), for the determination of an award of attorney's fees, as applied in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), stands for the rule that, if a plaintiff had received only partial or limited success, even where his claims were interrelated, nonfrivolous, and raised in good faith, the relationship between the amount of the fee awarded and the results obtained must be considered:

> " . . . the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. It remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award. . . .[T]he district court should make clear that *it has considered the relationship between the amount of the fee awarded and the results obtained." Id.* at 437 (Emphasis added)

In the instant case, the debtor Miami Center Limited Partnership's estate should *not* be held liable for reimbursement of an unspecified amount of attorneys' fees and costs to The Bank of New York, as the Plan's proponent, for an unspecified number of hours spent on its *unsuccessful* claims concerning issues *unrelated* to collection expenses. The Plan *wrongfully* subordinated the Miami Center Joint Venture's claim, and The Bank of New York's claim, *improperly* alleging that leased furniture, fixtures, and equipment were the property of debtor

Miami Center Limited Partnership as "unperfected security agreements," was denied.[10] App. 47-48. The Bank of New York also improperly alleged that property of Holywell Telecommunications Company and Holywell Leasing Company leased to the debtor Miami Center Limited Partnership were either owned by the Miami Center Limited Partnership or debtor Holywell Corporation. The bankruptcy court denied The Bank of New York's allegations on the same basis as its prior decision rejecting The Bank of New York's allegations with respect to the furniture, fixtures, and equipment leased by the Miami Center Joint Venture to the Miami Center Limited Partnership. App. 53.

Although the various courts of appeal have adopted the "Reasonableness" Standard and have recognized the relevance of the results obtained to the amount of a fee award, prior to this Court's opinion in *Hensley v. Eckerhart, supra,* they had adopted varying standards for applying this principle in cases where the plaintiff has not been successful on all claims asserted, 461 U.S. at 431, notwithstanding that " . . . congressional intent to limit awards to prevailing parties requires that . . . unrelated claims be treated as if they had been raised in separate

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[10] Bkrtcy. S.D. Fla., *The Bank of New York v. Miami Center Joint Venture, et al.*, 51 B.R. 56 (1985); affirmed S.D. Fla., No. 85-3430-Civ-Atkins, June 23, 1986 ["The Bank gave approval of the protective provisions of the leases that would assure MCJV's priority rights as owner. . . .The Bank filed the UCC-1 forms reflecting and recording the priority rights of MCJV as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors." (p. 3)]; affirmed Eleventh Circuit, No. 86-5609, October 12, 1988.

lawsuits, and therefore *no fee may be awarded for service on the unsuccessful claim.*" 461 U.S. at 435.

(b) The district court abused its discretion in affirming the bankruptcy court's award of attorneys' fees to The Bank of New York, since the bankruptcy court did not properly apply the standards and procedures based upon which the reasonableness of the award could be judged by the "abuse of discretion" standard of review.

The guidelines for the proper application of the "abuse of discretion" standard in the administration of the bankruptcy laws, *In the Matter of First Colonial Corporation of America*, 544 F.2d 1291, 1299 (5th Cir. 1977), citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), requires that a bankruptcy judge ascertain the nature and extent of an attorney's services. Each attorney seeking compensation is required to file a statement reciting the number of hours worked with a description of "how each of these hours was spent." *Supra* at 1299. If more than one attorney is involved, the bankruptcy court must determine the degree of duplication of effort. A distinction must be made between legal work and investigation, clerical work, compilation of facts, statistics and other work which can be done by nonlawyers. *Supra* at 1300.

After the nature and extent of the services have been determined, the bankruptcy court must assess the value of these services "based upon the reasonableness standard," and " . . . briefly explain the findings and reasons upon which the award is based, including an indication of how each of the 12 factors listed in Johnson affected his decisions." *Supra* at 1300.

The bankruptcy court's findings of fact illustrate the court's abuse of discretion as follows:

> "A precise count of the actual time spent in unreasonableness duplication is prevented here because the applicants frequently included other services in the same time charge without a breakdown." App. 20.
>
> "The Bank also concedes that there was significant duplication in the legal services it received." App. 18.
>
> "The Trustee's analysis is that 90% of the New York [Emmet, Marvin & Martin] firm's time before October 1985 and 80% afterwards include telephone calls or conferences with one or both other firms and that 79% of the nonbankruptcy Miami [Therrel Baisden & Meyer Weiss and Kirkpatrick & Lockhart] firms and 55% of the Miami [Steel Hector & Davis] bankruptcy specialist's time slips contain similar entries." App. 18.
>
> "I agree with the Trustee that the original narrative description of the services provided (except that given by Steel Hector) was woefully inadequate and, even as supplemented in January, leaves much to be desired." App. 21.

The Bank of New York's employment of three separate law firms and 30 different lawyers is *not* a reimbursable collection expense in accordance with the contractual documents. The loan documents specifically limit the Borrower's liability to payment of a "reasonable sum as an attorney's fee." The attorneys' fees and costs of Emmet Marvin & Martin are not compensable as a collection expense in a foreclosure or a bankruptcy proceeding related to property in Florida. The Bank of New York's employment of two separate law firms in Florida for collection is contrary to the loan documents. A careful analysis of the enumeration of time expended by the three separate law firms indicates duplication and triplication of efforts illustrated by conferences and telephone conversations in which two, three, or four lawyers

participated, and billing for court proceedings in which as many as six lawyers represented The Bank of New York.

(c) The doctrine that "[p]ersons who rendered beneficial services to the estate will not be precluded from reimbursement"[11] is applicable *only* " . . . so far as they benefitted the estate." *Randolph v. Scruggs,* 190 U.S. 533, 539 (1903). Fees and costs are *not* reimbursable to a party who has *damaged* third party creditors and the estate.

In the instant case, the bankruptcy court's finding that "the Bank's counsel did all that could have been asked of them and they did it well," App. 16, must be compared with the following uncontroverted facts in the record of the bankruptcy proceedings and the applicable provisions of the Bankruptcy Code:

(1) Although 11 U.S.C. Section 1129(a)(2) requires that the Plan's proponent comply with the provisions of title 11, notably the disclosure requirements of Section 1125, H.R. Rep. 95-595, 95th Cong. 1st Sess. (1977) at 412, notwithstanding the bankruptcy court's "Cash Collateral" Order, entered on December 31, 1984, upon the emergency motion of The Bank of New York, requiring the determination and payment of obligations to the Internal Revenue Service, App. 56, The Bank of New York did *not* disclose that the Plan made no provision for the payment of federal and state income taxes incurred during the administration of the estate[12] and arising from the

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[11] Herzog, *Fees and Allowances in Bankruptcy,* 36 Conn. B.J. 374 (1962).

[12] The corporate income taxes of Holywell Corporation, consolidated with nondebtor subsidiaries, and the personal

(Continued on following page)

sale of the estate's property[13] on behalf of Holywell Corporation and Theodore B. Gould's bankruptcy estate. App. 70, 71.

(2) The Plan's Article IV, *Means For Execution Of The Plan*, granted the Buyer a credit added to the allowed secured claim of the "BNY Debt" postpetition interest in the amount of *$27,050,115* for The Bank of New York's "undersecured" claim against the purchase price of $255,600,000 payable for the Miami Center, App. 39, notwithstanding that 11 U.S.C. Section 502(b)(2) precludes the allowance of unmatured interest on a claim[14] and 11 U.S.C. Section 506(b) limits the allowance of postpetition

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income taxes of debtor Theodore B. Gould's bankruptcy estate arise from taxable income in the amount of *$38,566,768* related to a cash distribution in the amount of *$32,971,830* received from their financial interests as partners in the sale of the property, referred to as the "Washington Properties," during the administration of the estate, of which the Plan's provisions vested possession of *$30,045,532* in cash and securities in the individual appointed as Trustee of the Miami Center Liquidating Trust.

[13] The sale of the Miami Center Limited Partnership's assets represented a net taxable capital gain of *$58,696,802* and an ordinary loss of *$19,861,810* to Holywell Corporation, consolidated with Miami Center Corporation. Theodore B. Gould's bankruptcy estate had a net taxable capital gain of *$18,976,083* and an ordinary loss of *$6,421,123* from the taxable events arising from the Trustee's sale of MCLP's assets in accordance with the Plan's provisions.

[14] See *Vandston Bondholders Committee v. Green*, 329 U.S. 156, 165 (1946); *Johnson v. Norris*, 190 Fed. 459 (5th Cir. 1911); *In re Walsh Construction*, 669 F.2d 1325 (9th Cir. 1982); Collier on Bankruptcy, Section 502.02 (15th Ed. 1984).

interest on a secured claim to the degree to which the collateral's value exceeds the claim.[15]

(3) The Bank of New York did *not* disclose that the Plan's "substantive consolidation" provision, eliminating the payment of ground rent from MCLP to Chopin, was an *impermissible* modification of a contract to which The Bank of New York's liens had been subordinated.

(4) The Plan made no provision for the repayment of "Super-Priority" loans in the amount of *$4,717,405* plus accrued interest previously authorized by the bankruptcy court. The Plan did not provide adequate funds to cure defaults in unexpired leases in accordance with 11 U.S.C. Section 1123(a)(5)(G). The Plan did not satisfy the adequate protection requirements of 11 U.S.C. Section 361(3) entitling an entity to realize from the sale proceeds "the indubitable equivalent of such entity's interest" in property in which the estate has no interest.

(5) The Plan has imposed a burden upon the Trust estate of *$7,191,297* as of October 31, 1989, in carrying costs as interest for the nonpayment of the Miami Center Joint Venture's wrongfully subordinated allowed claim, accruing at a daily rate in the amount of *$5,864*.

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[15] See *United States v. Ron Pair Enterprises, Inc., supra* at 1031 ["[T]he phrase 'interest on such claim' stands independent of the language that follows. 'Interest on such claim' is not part of the list made up of 'fees, costs or charges,' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well."] *Sexton v. Dreyfus*, 219 U.S. 339 (1911). *United Savings Ass'n of Texas v. Timbers, supra* ["Even more important for our purposes than Section 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims. . . ."]

(6) The burden of the Miami Center Liquidating Trust's administrative expenses in the estimated amount of $2,555,420 has been imposed upon the estate, notwithstanding the "Equitable Fund" doctrine, codified in 11 U.S.C. Section 506(c), that a secured creditor responsible for the appointment of a trustee should pay the estate's additional administrative expenses. *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936) ["It has always been the rule inherent in general principles of equity that the lienholder must bear the expense of bankruptcy administration which is solely for his benefit, or to which he consents, or which he causes."]

Although Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of a debtor's estate, more than four years have elapsed since the Plan's Effective Date and the entry of an order of substantial consummation. The Plan has not been implemented. The case has not been closed. The assets of the various estates have been commingled. Federal and state income tax returns have not been filed and no reserve has been established for the payment of income taxes incurred during the administration of the estate and arising from the sale of the estate's property.

CONCLUSION

For the foregoing reasons this Court should grant the Writ, and reverse and vacate the judgment of the court below.

Respectfully submitted,

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and HOLYWELL CORPORATION

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L "Memorandum Decision," U.S. Bankruptcy Court (S.D. Fla.), entered on September 27, 1985 in *Holywell Telecommunications Company and Holywell Leasing Company v. The Bank of New York,* Adv. No. 85-0906-BKC-TCB.....App. 52

M "Order On Emergency Motion To Treat Proceeds Of The Sale As Cash Collateral, To Segregate And Account For Cash Collateral," U.S. Bankruptcy Court (S.D. Fla.), entered on December 31, 1984.....App. 55

N "Final Judgment" (With "Findings Of Fact And Conclusions Of Law"), U.S. Bankruptcy Court (S.D. Fla.), entered on April 28, 1988.....App. 59

O Relevant Statutory Provisions.....App. 73

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5959

D.C. Docket No. 87-969

IN RE: HOLYWELL CORPORATION,

Debtor,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

BANK OF NEW YORK,

Defendent-Appellee

Appeal from the United States District Court for the Southern District of Florida

---

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 30, 1989
For the Court: Miguel J. Cortez, Clerk
By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: SEP 20, 1989

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-5959

IN RE: HOLYWELL CORPORATION,

Debtor

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants

versus

BANK OF NEW YORK,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 30, 1989, 11 Cir., 1989, ___ F.2d ___).

(September 5, 1989)

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule (35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
–FOR THE ELEVENTH CIRCUIT

No. 88-5959

D.C. Docket No. 87-969

IN RE: HOLYWELL CORPORATION,

Debtor,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants

versus

BANK OF NEW YORK,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 1989)

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM:

This is an appeal from an order entered in the United States District Court, *Holywell Corp. v. Bank of New York,*

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

(S.D. Fla. June 30, 1988), affirming two orders of the Bankruptcy Court, *Memorandum Decision on Estate's Liability for Bank's Fees and Expenses*, 68 Bankr. 134 (S.D. Fla. 1986); and *Memorandum Decision on Amount of Bank's Fees and Expenses*, (Bankr. S.D. Fla. Mar. 11, 1987).

We affirm the judgment for the reasons stated in and based upon the above listed orders.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE HOLYWELL CORPORATION

_____/

HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Appellants,

v.

THE BANK OF NEW YORK,

Appellee.

_____/

CASE NO.: 87-0969-CIV-NESBITT

ORDER

(Filed Sep. 7, 1988)

THIS CAUSE is before the Court upon Appellants' Motion for Rehearing and Memorandum of Law, filed on July 13, 1988. After a review of the memoranda filed by counsel, the applicable law, and the Court file in this cause, it is

ORDERED AND ADJUDGED that said Motion be, and the same is hereby, DENIED.

DONE AND ORDERED in Chambers this 6th day of August 1988.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT
JUDGE

cc: counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-0969-CIV-NESBITT

IN THE MATTER OF:

HOLYWELL CORPORATION, et al.,

Debtors.

ORDER
OF AFFIRMANCE
(Filed Jun 30, 1988)

_____/

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

_____/

This cause is before the Court upon an appeal taken from two order of the Bankruptcy Court, the Memorandum Decision on Estate's Liabilities for Bank's Fees and Expenses of November 5, 1987 ("the liability memorandum") and Memorandum Decision on Amount of Bank's Fees and Expenses of March 11, 1987 ("the fee award memorandum"). The Court has reviewed and duly considered the briefs filed by counsel, the relevant law, and heard oral arguments. The liability memorandum determined that the Bank of New York would be allowed a

general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the attorneys fees incurred in collection of loans to Holywell, including fees incurred in the bankruptcy proceedings. (The contractual right to the fees under applicable state law is not in dispute.)[1] This liability was predicated on 506(a),[2] which "separates an undersecured creditor's claim into two parts: He has a secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*" Notes of Committee on the Judiciary, Senate Report No. 95-989 (Emphasis added). The attorneys fees for collection of the debt are part of that claim. *LeLaurin v. Frost National Bank of San Antonio*, 391 F.2d 687 (5th Cir. ___), *cert. denied*, 393 U.S. 979 (1968).

---

[1] The Bank of New York argues briefly that it is in fact an over-secured creditor. *See* Order on Debtors' "Under Security Claim," December 18, 1987 (Weaver, J.). The Court is unaware to what extent the Bank of New York may be oversecured. As the fees and expenses may be allowed as secured claims only to the extent of the oversecurity, 11 U.S.C. 506 (1984), it is not known whether the claim for attorney's fees is within 506(b). However, the Memoranda decisions issued by Judge Britton treat the attorney's fees and expense claims as an unsecured claim. Accordingly, this Court will address the issue raised in the Appeal which treats the Claim as unsecured.

[2] The appellant Holywell Corporation contends that the Bankruptcy Court based the award on 506(b). This is incorrect. While the Bankruptcy Court prefaced the decision with the statement that 506(b) does not *preclude* an award of attorney's fees based on an unsecured claim, the decision itself is based upon 506(a).

The Bank of New York has an allowable claim[3] inasmuch as it is based on a contractual right under the loan documents signed by the parties. While the issue has not been squarely addressed in this circuit, numerous decisions exist in other circuits allowing such claims.[4] In *United Merchants and Manufacturers, Inc. v. Equitable Life Assurance Society of the United States*, 674 F.2d 134 (2d Cir. 1982), the Second Circuit stated:

> We cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy. . . . Moreover, the case law does not support a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy. In *Security Mortgage Co. v. Powers*, 278 U.S. 149, 49 S.Ct. 84, 73 L.Ed. 236 (1928), Justice Brandeis wrote for the Court: "The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, *either as a provable claim* or by way of a lien upon specific property."

* * *

---

[3] Appellant argues that the Supreme Court decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626 (1988) holds that such awards are precluded under 11 U.S.C. § 506(b). However the context of that case is completely inapposite: that case states that an unsecured creditor is not entitled to interest as compensation for delay caused by the automatic stay under 11 U.S.C. § 362(d)(1).

[4] The cases cited by Appellant Holywell Corporation do not support their proposition: their cited cases merely address the issue of whether creditor seeking recovery under section 506(b) must be an oversecured creditor.

> UM&M asserts that the legislative history of section 506(b) indicates that the statute was intended to codify pre-Code law that only a secured creditor can assert a contractually-based right to recover collection costs. Brief for Appellees at 28-29. Section 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim,* its right to interest and costs arising under its credit agreement. . . .Neither the statute nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees. . . .Equitable and Hancock correctly respond, however, that their claims for collection costs are based in contract and are independent of statutory compensable administrative expenses for services rendered to the estate. As such, these claims are provable under section 63 of the Act.

Id at 137-38; *LeLaurin v. Frost National Bank of San Antonio,* 391 F.2d 687 (5th Cir. 1968) (allowing claim for reasonable attorney's fees). *See also In re Ladycliff College,* 56 Bankr. 756 (S.D.N.Y. 1985); *In re Ely,* 28 Bankr. 488 (Bankr. E.D. Tenn. 1983); *In re Tri-State Homes, Inc.* 56 Bankr. 24 (Bnkr. W.D. Wis. 1985); *In re Missionary Baptist Foundation of America,* 24 Bankr. 970 (N.D. Tex. 1982); *Matter of 268 Ltd.* 789 F.2d 674 (9th Cir. 1986); *In re Martin,* 761 F.2d 1163 (6th Cir. 1985); *Liberty Nat'l. Bank & Trust Co. v. George,* 70 Bankr. 312 (W.D. Ky. 1987).

The remaining issues raised by Holywell Corporation are similarly without merit. Accordingly, it is

ORDERED AND ADJUDGED that the above-stated Memoranda Decisions entered by the Bankruptcy Court are AFFIRMED.

DONE AND ORDERED at Miami, Dade County, Florida this 30th day of June 1988.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

APPENDIX F

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

CASE NO. 84-01590-BKC-TCB
CHAPTER 11

MEMORANDUM DECISION ON AMOUNT OF BANK'S FEES AND EXPENSES

The Bank of New York, the largest creditor of these debtors, has applied for attorneys' fees in the amount of $1,300,991, plus attorneys' expenses of $229,434, together with prepetition expenses paid to Florida Power & Light and Turner Construction Co. in the amount of $325,033 (a total of $1,855,458). (C. P. No. 1281). The Bank seeks reimbursement for these sums, which it has already paid.

The application, which was heard initially on October 20, 1986, has been vigorously opposed by the Liquidating Trustee, the debtors' and a major creditor, Olympia & York.

This court's November 5 Memorandum Decision on Estate's Liability and Bank's Fees and Expenses (C. P. No. 1451) held that the Bank had waived any priority administrative claim it had under 11 U.S.C. §503(b)(3)(D) and (4) for its substantial contribution in the case, and had also waived any security for its claim, but that it still has a general, unsecured contractual claim under §506(a) for

these asserted collection fees and expenses. That Decision also recognized that the Bank, as the successful proponent of a reorganization plan confirmed by this court August 8, 1985, had voluntarily subordinated its unsecured contractual claim to the claims of all other general, unsecured non-insider claims.

All other general, unsecured non-insider claims have been paid or provided for in full and it presently appears probable, though not yet certain, that there will be ample assets to pay this claim of the Bank in full though not enough to also completely satisfy the insider claims.

The November Memorandum Decision did not resolve the amount of the Bank's permissible claim. A further hearing was held November 20, 1986 for that purpose. Detailed memoranda from the Liquidating Trustee (C.P. No. 1494a) and the Bank (C. P. No. 1532a and b) are now before me addressing that issue. The liquidating Trustee has recommended that the Bank's claim be reduced to $319,550.

I find and conclude that the Bank's allowable general, unsecured and subordinated claim includes the $325,032 it paid Turner Construction and Florida Power & Light as well as $1,126,824 in fees together with a part of its attorneys' expenses. The amount of the allowable expenses remains to be determined by the Trustee in accordance with this Decision. No part of the foregoing allowed claims was satisfied or released in the Trustee's conveyance in October 1985 of the Miami Center to the Bank's nominee.

The contractual predicates for this claim are the loan documents covering the $240 million principle and interest owed the Bank by the debtors. Though not identical, these notes provide in essence for reimbursement of all reasonable fees and expenses incurred by the Bank in obtaining "collection" of the indebtedness. New York law is controlling in the interpretation of these contractual provisions. However, no party has identified any New York statute or precedent which would depart from the general principles identified and followed in Florida or in the federal decisions passing upon the reasonableness of fees and expenses, most recently *Blum v. Stenson*, 465 U.S. 886 (1984) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The debtors defaulted in February 1984. The commencement of a Florida foreclosure action in July prompted these bankruptcy petitions, filed in August 1984, which stayed the foreclosure. In order to preserve the value of its collateral (the partially uncompleted and largely unoccupied Miami Center complex, a luxury hotel and office building in the heart of Miami), the Bank was forced to advance funds to offset operating deficits, actively supervise the debtors' operations, and present and win support for a chapter 11 plan. It faced determined and constant opposition of the debtors as well as some creditors. It accomplished its objectives with unusual dispatch, obtaining confirmation of its plan in August 1985. As a result the bank has recovered almost all of its total claim, losing only its default interest increment. Had it not been successful in these bankruptcies, it faced a substantial loss of its principal as well as all interest. Neither the debtors nor any other party had the means or the ability to untangle the mess brought to this

court by the debtors. The Bank's counsel did all that could have been asked of them and they did it well.

The Advances to Turner and Florida Power & Light

I agree with the Bank that, under the circumstances of this case, the $186,796 advanced to Turner Construction to complete construction and the $138,236 paid to Florida Power & Light for the Center's June 1984 power bill were expenses essential to the protection of the Bank's collateral and, therefore, recoverable as a part of this claim. If ¶1:08(a) of the $89.5 million mortgage does not expressly so provide (and I believe it does), this expensive is impliedly covered. These obligations were separately and specifically acknowledged and approved by the debtors when they were made by the Bank.

Attorneys' Fees

The rest of the Bank's activity, which I have summarized above, was the work of its attorneys. The trustee argues that most of these services were not "collection" expenses and, therefore, are not contractually recoverable after the stay of foreclosure. When the debtors stopped the foreclosure by filing these chapter 11 bankruptcies, most of the challenged legal services became essential to the collection of the debt. I find that, with the exception of the Bank's "ownership" legal services and duplicated services discussed below, each was a collection expense and falls within the contractual provision.

The Bank concedes that $466,926 of the Attorneys' fees it has paid the applicants were for "ownership services" and are not recoverable. I accept the applicants' account of these non-recoverable fees and have deducted them.

The Bank also concedes that there was significant duplication in the legal services it received. In its initial application, the Bank estimated the unnecessary duplication at "approximately" $700,000, at the same time it underestimated its ownership services at $300,000. (C.P. No. 1281 at p. 6). It has also underestimated the degree of duplication, which I fix at $1,174,412.

The Bank was served by the New York law firm which had represented the Bank for 150 years, by Miami attorney without bankruptcy expertise but who had previously handled a number of matters in Miami for the Bank, and by another Miami firm with bankruptcy expertise. It is understandable that the Bank turned to each of these attorneys for guidance and help, and some participation and oversight by the first two is also understandable and reasonable. However, the prodigious involvement and consequent duplication evident here, caused largely by the involvement of the first two attorneys in the handling of the bankruptcy case, was neither necessary nor reasonable. It forms the primary basis for the three objections to the Bank's requested reimbursement from the bankruptcy estate.

The trustee's analysis is that 90% of the New York firm's time slips before October 1985 and 80% afterwards include telephone calls or conferences with one or both other firms, and that 79% of the non-bankruptcy Miami

firms' and 55% of the Miami bankruptcy specialist's time slips contained similar entries.

Both the first and second Miami attorneys engaged by the Bank were completely qualified and equipped to handle the foreclosure and provide all legal services incident to collection of the Bank's claim, both before and after the foreclosure filing, until the debtors filed for bankruptcy. The necessary and reasonable participation by the New York firm, which could not institute foreclosure, and by more than one Miami firm during this phase was nominal.

The Miami firm engaged for its bankruptcy expertise is one of the oldest in Florida, is amply staffed with well-qualified attorneys and enjoys an outstanding reputation not only in bankruptcy but in the rest of its general civil practice. After the filing of bankruptcy and its engagement to represent the Bank in the bankruptcy, the necessary and reasonable participation by the other two firms became minimal.

If the Bank preferred the comfort of consultive participation by more than one firm for each of the two distinct phases involved in the collection of its claim, it had every right to purchase such comfort. It is not, however, entitled to recover that additional cost from this estate at the expense of the other claimants.

As was noted in *In re United States Merchants and Manufacturers, Inc. v. Equitable Life Assurance Soc'y of the United States*, 674 F.2d 134, 139 (2nd Cir. 1982):

> "[A] rule of reason must be observed, in order to avoid such clauses [for the recovery by secured creditors of their collection expenses] becoming

> a tool for wasteful diversion of an estate at the hands of secured creditors, who, knowing that the estate must foot the bills, fail to exercise restraint in enforcement expenses."

In this case, as is frequently the case, it was not predictable from the outset that the Bank would ultimately recover all its principal, as well as its interest and expenses. However, if the Bank and its counsel appreciated this fact, I believe both exercised less restraint in providing and paying for these services then they would have if there had been no contractual basis for reimbursement.

The Bank does not dispute the trustee's tally of time slips where the Bank's attorneys talked to each other, but disputes the trustee's exclusion of all these time slips. A precise count of the actual time spent in unreasonable duplication is prevented here because the applicants frequently included other services in the same time charge without a breakdown, and some degree of supervision and coordination was reasonable. From my review of these charges, I estimate and find that two-thirds of the percentages calculated by the trustee should be deducted as unnecessary duplication. It is the Bank's burden to justify its application. B.R. 2016(a); *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1299 (5th Cir. 1977); 2 *Collier on Bankruptcy* ¶330.05[2][b] n. 19 (15th ed. 1986). If the remaining third does not fairly cover the time spend upon activities other than consultation and the consultation time was reasonably spent with respect to facets of the representation which lie along the boundaries of the special expertise and responsibility of the three firms, the

Bank must bear the consequences of its incomplete documentation.

Through oversight, the Bank's original application (C.P. No. 1281) omitted eight months' charged before February 1, 1984, and it also contained a major mathematical error in the computation of attorneys' fees. I have accepted the Bank's corrected figures (an increase of $467, 174 or 20%) on the premise, as it represents, that it made these corrected figures available to the three objecting parties "months in advance of November 1986 hearing". Of course, neither error was deliberate.

I agree with the trustee that the original narrative description of the services provided (except that given by Steel, Hector) was woefully inadequate and, even as supplemented in January (C. P. No. 1532a), leaves much to be desired. I have, however, accepted the belated explanations filed by the Bank in response to the trustee's objections.

The trustee has properly noted the gross discrepancies between earlier figures given the court by the Bank as to its litigation expenses and its present figures. These discrepancies resulted, I believe, from inadequate record-keeping and carelessness on the part of Mr. Noone's and Mr. Ziegler's firms which may not have anticipated bankruptcy or the degree of scrutiny fee applications receive in bankruptcy. There was no intent to deceive anyone and these discrepancies did not prejudice any party. They do

not now warrant rejection of any part of the Bank's claim.[1]

The trustee argues that time spent by the Bank in defending appeals and in litigation involving non-bankrupt subsidiaries of the debtors ought not to be included in the recoverable collection expenses. I disagree. The Bank's appellate expenses were essential in collecting its account. Similarly, it become necessary in this case for the Bank to pursue the assets of non-bankrupt subsidiaries owned by the debtors and, therefore, assets subject to disposition under the Bank's plan. No party has shown me that New York law requires the exclusion of either of these expenses.

I also reject the trustee's contention that fees paid since the fall of 1985 by a different entity, M.C. Holdings Partners, should not be considered for reimbursement. In their purchase from the trustee, the Bank and the institutional lenders who participated in the Bank's loan elected to take title to the Miami Center property through a land trust under that name. The participants and the percentage participation remained identical. The change was one of form, not substance, and there is no basis to now disqualify reimbursement of the fees paid by the Bank's successor in interest.

I find, therefore, that the attorneys' fees recoverable by the Bank total $1,126,824. To assist the parties in

---

[1] The Bank's commitment with respect to its maximum prepetition collection expenses ($831,563) noted in the March 20, 1985 judgment determining the amount of its lien is binding upon the Bank. However, that sum exceeds the reimbursement approved by this court.

verifying the calculations which have resulted in this finding, I attached a schedule entitled Attorneys' Fees Adjustments reflecting and explaining those calculations.

Attorney's Expenses

The Bank also seeks reimbursement for the expenses it has paid its lawyers ($229,434). Many of the items billed for have already been considered by me as part of the attorney's normal overhead in accepting the hourly billing rates charged by these firms. These items include internal charges, as distinct from expenses paid to others in arms-length transactions; charges for services traditionally provided by attorneys or their secretaries, such as legal research and the preparation of documents and extra copies; and supplemental payments made to the firm's staff; as well as all "miscellaneous" charges. They are denied reimbursement as costs or expenses. *Matter of Interstate Stores, Inc.*, 437 F.Supp. 14, 17 (S.D.N.Y 1977); *Matter of Tom Moore Distillery Co.*, 52 F.Supp. 938 (W.D.Ky. 1943); *Matter of National Radiator Co.*, 29 F.Supp. 804 (W.D.Pa. 1939); *Watters v. Hamilton Gas Co.* 29 F.Supp. 436 (S.D.W.Va. 1939), *aff'd*, Ill F.2d 100 (4th Cir. 1940); *Matter of Mercantile Arcade Realty Corp.*, 20 F.Supp. 397 (S.D.Cal. 1937).

I have found no explanation or justification for the "costs advanced" billings by Meyer, Weiss (Mr. Ziegler's former firm) of September 6, 1984 through June 3, 1985. The billings refer to "itemized cost statements" which are not in this record. These unexplained charges must also be denied.

The trustee's counsel is to (a) deduct from the billings of all the Bank's attorneys reproduction and photocopy charges unless paid to third parties, computer research including Mead Data and Lexis charges, word processing charges, overtime pay, meals, carfare, local travel and parking expense, conference lunches and dinners, lost luggage replacement, postage, and all miscellaneous charges – whether standing alone or lumped with other items – as well as all similar charges; (b) deduct the Meyer, Weiss "costs advanced" identified above, unless the "itemized costs statements" are now in this record; and (c) multiply each of the resulting net charges by the percentage figures in the fifth column of the attached schedule of Attorneys' Fees Adjustments. This multiplication restricts recovery to those expenses attributable to reimbursable legal services, accepting the Bank's suggestion that expenses be prorated in this manner. (C. P. No. 1532a, Noone Affidavit ¶ 3).

I further request that trustee's counsel submit an Order, in accordance with this Memorandum Decision, directing the trustee to pay jointly to the Bank and M. C. Holdings Partners the total figure resulting from the calculations directed in the preceding paragraph, plus the $325,032 paid by the Bank to Turner and Florida Power & Light, and plus the $1,126,824 which I have found to be the reimbursable attorney's fees.

It is possible that the Bank will incur some further legal expense incident to this case. However, it elected not to estimate and anticipate that expense in this final application. These bankruptcies should be concluded and that requires finality in the consideration of this claim. No further application from the Bank will be considered.

DONE and ORDERED in Miami, Florida this 11th day of March, 1987.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge

Copies to:

Attorney for Debtors
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ATTORNEYS' FEES ADJUSTMENTS

	Billed to Bank[1]	Ownership[2] Services	Duplication[3] Adjustment	Recoverable[4] Fee	Recoverable as Percent of Total[5] Billed to Bank
		(Services from 6-9-83 to 10-10-85)			
Noone	$1,192,641	$167,625	$615,009	$ 410,006	34.4%
Salter	533,574	17,823	189,280	326,471	61.2%
Ziegler	316,808	7,308	163,106	146,394	46.2%
		(Services from 10-11-85 to 4-30-86)			
Noone	$ 373,455	$200,365	$ 92,256	$ 80,834	21.6%
Salter	264,339	66,330	72,669	125,340	47.4%
Ziegler	87,346	7,475	42,092	37,779	43.2%
			Total Recoverable Fees	$1,126,824	

[1] Noone Affidavit ¶3.

[2] Noone Affidavit ¶4 and Exhibits C & D.

[3] Percentage of time entries reflecting interfirm calls and conferences (per trustee memo pp. 7-14) times two-thirds times total billed to bank less ownership services.

[4] Total billed to bank less ownership services and duplication adjustment.

[5] Recoverable fee divided by total billed to bank. To be used in allocation of expenses.

APPENDIX G

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	CASE NO. 84-01590-BKC-TCB
HOLYWELL CORPORATION, ET AL.,	)	CHAPTER 11
Debtors.	)	

MEMORANDUM DECISION ON ESTATE'S LIABILITY FOR BANK'S FEES AND EXPENSES

(Filed Nov. 6, 1986)

The Bank of New York, the largest creditor of these debtors, has applied for attorneys' fees in the amount of $1,300,991, plus attorneys' expenses of $229,434, together with prepetition expenses paid to Florida Power & Light and Turner Construction Co. in the amount of $325,033 (a total of $1,855,458). (C. P. No. 1281). The Bank seeks reimbursement for these sums, which it has already paid. It was heard on October 20.

The application has been vigorously opposed by the Liquidating Trustee (C. P. No. 1418), the debtors (C. P. No. 1430) and Olympia & York (C. P. No. 1427). Because the objections raised serious question as to whether the Bank's claim had been waived or was time-barred, the application was taken under advisement for a determination of the estate's *liability* with respect to this application, reserving to a further hearing and a separate order

the *amount* of that liability in the event that the estate remains liable for any part of the application.

I conclude that the Bank has waived any claim it had under 11 U.S.C. § 503(b) (3) (D) or (4), which provides priority administrative claims for creditors who make a substantial contribution in a reorganization case. I also conclude that the Bank has waived any secured status for any part of this claim for which it has not yet already received credit during the sale that was closed on October 10, 1985. However, I agree with the Bank that its unsecured contractual claim, which it has voluntarily agreed to subordinate to the full payment of Classes 1 through 6 of the confirmed plan, is properly before the court and requires a further hearing for the determination of the amount of that claim.

The Bank's application is asserted, alternatively, as a contractual claim under § 506 and as an administrative claim under § 503(b).

Contractual Claim § 506

On March 20, 1985, in Adversary Proceeding No. 85-0160, the amount and priority of the Bank's lien against the Miami Center property was fixed in a judgment that has become final, reserving only the question whether the Bank's *prepetition* legal and loan expenses (which the Bank by stipulation limited to $831,563) were allowable as part of the lien. That issue was never brought forward by the Bank and, therefore, was never resolved before the October 10, 1985 closing that occurred pursuant to the confirmed plan. At that closing, the Liquidating Trustee conveyed the Miami Center to the

Bank's nominee, giving the Bank full credit for its lien. It is not clear to me whether the Bank received credit for the $831,563 or not, which could bear upon the amount recoverable by the Bank. That point may be clarified at the subsequent hearing.

In the contract of sale executed between the Liquidating Trustee and the Bank at the closing, it was stipulated between these two parties that the closing neither precluded nor prohibited the Bank from seeking and obtaining allowance by the court of its expenses and fees after payment of Classes 1 through 6 inclusive, notwithstanding the fact that the Bank was entitled to a Class 2 priority. In effect, the Bank acknowledged that its claim was a general unsecured claim which it consented to subordinate to the claims of other general unsecured non-insider claims. It did so because commitments had been made to those creditors that they would be paid first.

The objectors argue that the October 10, 1985 closing precludes any further consideration of the Bank's contractual claim predicated upon the provisions in the debtors' notes and mortgages. The notes and mortgages provide in various forms for reimbursement of the reasonable expenses incurred by the Bank in the collection of its debt. I agree that the Bank has lost its opportunity to assert any further *secured* status for this contractual claim because its collateral, the Miami Center property, has now passed from the control of this court and I see no reasonable predicate for the Bank to claim that the real property remains subject to the Bank's unliquidated contractual claim.

I disagree, however, with the objectors that the foregoing circumstances extinguish the Bank's *unsecured* contractual claim. Although § 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of the pledge collateral. 3 *Collier on Bankruptcy* ¶506.05 n. 5 (15th Ed. 1986).

The Bank's timely claims 228 through 232 which were filed in this case expressly asserted its claim for attorneys' fees and costs. Those claims remain subject to consideration by the court as unsecured claims. § 502(j).

Administrative Claim § 503(b)

By an Order dated September 27, 1985 (C. P. No. 1014), all administrative claims were required to be filed not later than October 17, 1985. The Bank's only response to that Order was a motion filed October 17 (C. P. No. 10[illegible]) for a hearing to determine its legal and loan expenses pursuant to the judgment of March 20, 1985, which has been discussed above. In that motion, the Bank took notice of the Order of September 27 and correctly noted that the Order related to Class 1 administrative claims under § 503(b). The motion stated:

> The Bank's claims for legal and loan expenses are not sought to be allowed as Class 1 administrative claims, but rather as recoverable expenses under the Bank's lien documents (after payment of all class 1 through Class 6 claims). The Final Judgment of March 20, 1985 reserved ruling in respect to such expenses.

The motion further recited that:

> Since the claims are not Class 1 administrative claims, the Bank's request for a hearing will not delay or impede (a) the Class 1 fee applications to be heard on October 21, 1985, or (b) the payment of undisputed Class 1 through Class 6 claims pursuant to the Plan.

This motion, which was unopposed, was granted (C. P. No. 1072) and the Bank was directed to file an application and set a hearing.

The objectors argue that in the foregoing motion the Bank unambiguously waived its right to assert an administrative claim under § 503(b) and elected to assert only its contractual claim, acknowledging its previous consent to subordination of that contractual claim. The objectors also argue that the Bank's administrative claim, asserted for the first time in the instant application filed June 13, 1986 is time-barred by the Order of September 27, 1985. I agree with the objectors in both respects.

The Bank's only response is the suggestion that because there is no statutory provision nor any rule which imposes a deadline for the filing of administrative claims under § 503, such claims may be filed at any time. By inference, the Bank argues that the court lacks authority to impose a deadline as was done in this instance. The Order was clearly within the court's reasonable discretion under § 105(a). It is essential that administrative claims, which are entitled to first priority in a bankruptcy distribution, be established with finality before any distribution may be made to any subordinate classes of creditors. This deadline was fixed, without objection from any party, to coincide with the distribution provided under

the confirmed plan. Its establishment in this case was necessary, reasonable and authorized by § 105(a).

As has already been noted, the rejection of the Bank's alternative theory belatedly asserted under § 503(b) is consistent with the Bank's previous position and the Bank's consent to subordinate its fees and expenses to the Class 1 through 6 claims. The rejection of this alternative theory has no effect on the Bank's contractual claim, other than a possible effect on the amount allowable, a consideration which must await a further hearing.

A further hearing on the Bank's application will be held on Thursday, November 20, 1986 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida, to hear the parties with respect to the *amount* of the Bank's claim.

I have deliberately entered this Memorandum Decision without an accompanying order because I intend that there be a single, final appealable order upon the Bank's application, which includes the fixing of the amount of that claim. The review of that final order would reach the issues discussed in this Memorandum Decision. My purpose, obviously, is to avoid the inconvenience and confusion that could result from two appealable orders which might be assigned to different District Court judges for review.

DONE and ORDERED in Miami, Florida this 5th day of November, 1986.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better.

The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtor's debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditor's committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures

the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29.

(C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b) (1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtor's plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

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All Committees
Vance Salter, Esquire
All creditors

APPENDIX I

IV. *MEANS FOR EXECUTION OF THE PLAN*

Sale of Miami Center

The plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtor's pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase

option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title;

however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

APPENDIX J

III. *CLASSIFICATION OF CLAIMS AND INTERESTS*

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1 - Administration Claims as the same are allowed and ordered paid by the Court.

Class 2 - The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3 - The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4 - All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 5 - All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under §507(a)(3) and tax claims of governmental units

entitled to priority made §506 and §507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6 - The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7 - The MCJV Claim and the O&Y Claim.

Class 8 - The Claims of Affiliated Creditors.

Class 9 - The interest of the Debtors which remain after consummation of this Plan.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORP., *et al.*

Debtor(s).

Adv. No. 85-0566-BKC-TCB-A

THE BANK OF NEW YORK

Plaintiff,

v.

OLYMPIA & YORK FLORIDA EQUITY CORP.
O & Y EQUITY CORP., THEODORE B. GOULD,
MIAMI CENTER JOINT VENTURE

Defendants.

MEMORANDUM DECISION

The issue here is whether two agreements executed in May 1981, in which Miami Center Joint Venture leased certain personal property to Miami Center Limited Partnership are "true leases" or are in effect conditional sales

and therefore "leases intended as security". I concluded that they are true leases.

The personal property is furnishings, fixtures and equipment that were purchases to equip a hotel in Miami. The building is owned and operated by the lessee which is a chapter 11 debtor in this court. The leased personal property cost $7.8 million.

The lessor joint venture was formed two months before the lease. Its two general partners are T. B. Gould, another chapter 11 debtor in this court, and Olympia and York Florida Equity Corporation (O & Y), which loaned the lessor the $7.8 million that funded the purchase of the equipment. These two partners have been constantly at each other's throat in various courts since shortly after the leases were executed, but they are on the same side here.

Gould is not only of the general partners of the lessor joint venture, he also controls three other related chapter 11 debtors in this court.

The plaintiff bank was the construction lender for the hotel and office buildings. It is owed $50 million on its mortgage and is the largest creditor of the five related debtors which are dominated by Gould. Its chapter 11 plan to liquidate these five debtors' assets and distribute the proceeds is presently under consideration by this court along with competing plans presented by Gould.

The bank seeks a determination that the two leases are not true leases. The four defendants urge the contrary. The matter was tried on May 30.

If the leases are "true leases", the leases will be "assumed" under 11 U.S.C. § 365 under each of the competing plans. If reorganization fails, a liquidating trustee will also, as a practical matter, require the leased equipment. Assumption requires that the lease defaults be promptly cured. The accrued, unpaid rent to date is between $6.1 and $13 million depending on when the leases commenced, a disputed point not yet addressed by the parties. If the leases are found to be "true leases", no one would receive a windfall or gain any other inequitable advantage.

If on the other hand, the two leases are not "true leases," as the bank argues, the bank will come out of reorganization at least $10 million ahead of what it stands to recover if the two leases are given effect. This would be a complete windfall for the bank. The principal loser will be O & Y, which provided the purchase money for the equipment. No rent has ever been paid on the leases. O & Y's only recourse is against the lessor, which would lose title to the equipment and would itself become the holder of a worthless claim against the lessee for an unperfected security interest. Similarly, O & Y's claim against the lessor would be a claim as an insider, which would be behind all the claims of other creditors. O & Y's claim would be rendered virtually worthless.

The predicate for the bank's contention is UCC § 1-201(37), *Fla. Stat.* § 671.201(37):

> "(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation . . . Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest, but a consignment is in any event subject to the provisions on consignment sales

> (s.672.326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

A "security interest" if not perfected becomes unenforceable against the lessee here, which is a chapter 11 debtor-in-possession. 11 U.S.C. § 1107(a). These leases expressly prohibited the assertion of perfection of any security interest against the lessee.

The leases were executed for each party by Gould in his capacity as general partner of each entity. He denies any intention to create anything other than a true lease. It is undisputed that Metropolitan Life, the prospective permanent lender for the buildings, insisted that the equipment be leased and there be no perfected security interest against the property. It also reviewed and approved the leases, as did the plaintiff bank, before they were executed. Metropolitan's motives do not appear in this record. It has not been suggested that Gould had anything to gain by leasing the equipment rather than by purchasing it with borrowed funds collateralized by the equipment. I am satisfied that his only motive was to satisfy Metropolitan.

Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its

plan describes and treats the leases as leases, not as disguised conditional sales.

Neither the history nor the form of the documents, the direct testimony of the parties as to their intent, nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease. It is the bank's argument that the terms of the leases compel the conclusion that the parties in fact intended a conditional sale.

In *American Standard Credit Inc. v. National Cement Co.*, 643 F.2d 248, 261 (5th Cir. 1981) the court noted that the question whether particular transactions are "true leases" or "leases intended as security" is one of the most hotly litigated topics in commercial law, that there is considerable conflict among the various jurisdictions, and that federal courts are bound to apply the interpretations of the applicable State court "insofar as such interpretation may be discerned." It dealt with an Alabama lease.

Florida law is controlling here and the only reported case from a Florida court is *U. C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384 (Fla. Dist. Ct. App. 1983). This decision affirmed a trial court's holding that a bank's perfected security interest in certain equipment was superior to a purported lessor's claim which had not been recorded as a security agreement. The trial court found the equipment lease to be not a "true lease" but rather a "secured transaction."

In this reported decision, neither the lessor nor the bank stood to gain a windfall. Each was the innocent victim of a merchant who executed separate inconsistent

agreements, first to lease from the lessor then to pledge the leased equipment to the bank for a loan.

Neither this decision nor any I have seen applied UCC § 1-201(37) where the result is to give one party a windfall at the expense of an innocent party. The legislative purpose was to protect the lessee's other creditors from fraud and deception. There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the bank was not misled or deceived in anyway.

UCC § 1-102(1), *Fla. Stat.* § 671.102(1), requires that:

> "This code shall be liberally construed and applied to promote its underlying purpose and policies."

To construe and apply the code to produce the result urged here by the bank would defeat the purpose and policy of the code. It is a shield, not a sword.

Furthermore, the Florida court identified features of the transaction before it which promoted its conclusion, at least four of which are absent in out case.

1. There, the option price given the lessee to acquire title was "nominal" about 10% of the initial price. In our case the option price is the *greater of the unrecovered original cost or the market value* at the time the option is exercised. The only evidence of market value is an appraisal eight months ago of $7.7 million, 99% of the purchase price. I find that plaintiff has failed to carry its burden of showing that the option price would be "nominal" at any time during the 60-month life of these leases.

2. There, the initial payments, monthly payments, and option prices were readily equated to the current rate

of interest and the lessor admitted that the payments were determined by the related to the cost of funds and interest rates. Of course, every lessor must consider and try to recoup its investment, but in our case, there was no down payment, no such congruency, and no such admission as was before the Florida court. We have two leases executed on the same day involving the same kind of property, but which produce two different rates of return for the lessor.

3. There, the lessor required a guaranty of payment. There is none here.

4. There, the lessee was granted the investment tax credit. Here, the lease gives it to the lessor which has used it.

U. C. Leasing, therefore, is readily distinguishable from the case before this court.

In *American Standard Credit*, the Fifth Circuit reversed the district court's holding that the equipment lease in question there was not a true lease. The seven factors which the court found to be crucial to its conclusion are each paralleled here. *Id.* at 266.

I have made no reference to defendants' argument that plaintiff is estopped or has waived its right to make the argument it has made here, because I do not find the elements of either defense in this record. No party justifiably relied to its detriment on any conduct of the plaintiff and there is no clear evidence of an intent on the part of the bank to give up this contention.

The bank has asked, in the alternative, that this court define what must be paid to the lessor to assume and

cure the lease default. The parties have neglected this issue and a further hearing will be held on Monday, July 8, 1985, at 9:30 a.m., in Courtroom 1406, 51 S.W. 1 Avenue, Miami, Florida, to consider (a) motions for rehearing, (b) to hear the parties on the amount required to cure the lease defaults, (c) to hear any other issue necessary to the entry of a judgment in this adversary proceeding and, (d) to consider the effect of this decision on the pending, chapter 11 plans.

DONE and ORDERED at Miami, Florida, this 24th day of June, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

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APPENDIX L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re: HOLYWELL CORP., et al. Debtor(s).	CASE NO. 84-01590-BKC-TCB CHAPTER 11
HOLYWELL TELECOMMUNICATIONS COMPANY, and HOLYWELL LEASING COMPANY, Plaintiffs, vs. THE BANK OF NEW YORK, Defendant.	ADV. NO. 85-0906-BKC-TCB-A

MEMORANDUM DECISION

At the trial held on August 8 upon this adversary complaint, the parties agreed that the only issue to be decided is whether two agreements entered into in February, 1983 between the plaintiffs and Miami Center Limited Partnership are "true leases" or are "leases intended as security." The lessee is a chapter 11 debtor in this court. A prior adversary proceeding involving this same debtor and a lessor joint venture formed by T. B. Gould, another chapter 11 debtor in this court, and a third party, O&Y Equity Corp., was decided against The Bank of New York on this same issue concerning two other leases.

The lessors in this case are subsidiaries of the debtor which were formed to lease furniture, fixtures and electronic equipment necessary for the operation of the debtor's luxury hotel and office building. The features of the transaction which were previously considered in analyzing the "A" and "B" leases are factually similar. I considered the fact that the "C" and "D" leases provide that the lessee may take the investment tax credit is not determinative of a different intent since the lessors actually took the tax credit.

The factual differences from the prior proceeding do not require a different result. I conclude that the subject leases, identified as category "C" and category "D" leases, are true leases. It is not necessary to repeat the discussion relevant to this issue contained in this court's memorandum decision of June 24, 1985. The factors considered and the discussion are applicable to this case.

The bank was not misled or deceived in either case. The bank's argument the Gould is not to be viewed as an innocent party and that his multiple entities served to give him an advantage to the detriment of his creditors does not overcome the fact that the windfall it could receive if there were no other way to avoid this claim is not justified under these facts.

I also find that the bank's argument that Gould engaged in a "shell game" where a lessee/lessor relationship never existed does not meet the burden of proof to support its counterclaim that the leases were in fact financing agreements.

Subsequent events made it unnecessary, I believe to determine the amount required to cure the defaults on

these two leases. As required by B.R. 9021(a), a separate judgment will be entered declaring the category "C" and "D" leases to be true leases rather than security agreements.

DONE and ORDERED in Miami, Florida this 27the day of September, 1985.

/s/ Thomas C. Britton
Thomas C. Britton
Bankruptcy Judge

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APPENDIX M

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	Cases Nos.: 84-01590-BKC-TCB
HOLYWELL CORPORTATION, et al.,	)	84-01591-BKC-TCB
Debtors.	)	84-01592-BKC-TCB
	)	84-01593-BKC-TCB
	)	84-01594-BKC-TCB
	)	Proceedings in Chapter 11

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code §363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion

of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further ordered of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of the sale and any interest if may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net

proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in §363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business

expenses due to December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December, 1984.

/s/ Thomas C. Britton
Thomas C. Britton
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be performed by Fred H. Kent, Jr.

APPENDIX N

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES AND THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
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Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and

the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities

include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541 (a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b) (3), (b) (4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United States Code, or assignee . . . ," under 26 U.S.C. § 6012 (b) (3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b) (4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United

States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b) (4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b) (3), (b) (4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012 (b) (3) and (b) (4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012 (b) (3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him

in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States,* 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States,* 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012 (b) (3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012 (b) (3) or a fiduciary under 26 U.S.C. § 6012 (b) (4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust

assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012 (b) (3) OR (b) (4). *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012 (b) (3) and (b) (4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012 (b) (3) OR (b) (4) beyond the clear import of their language. *See Greyhound Corp*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The

retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of its powers regarding the trust. 26 U.S.C. § 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust – its corpus and any income earned therefrom – is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to

satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner,* the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner,* 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is

the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner,* 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner,* 52 Bankr. 859. *See also Stockton v. United States,* 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York,* Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton Corp.,* 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.,* 505 F. 2d 1011, 1014 (5th Cir. 1974); *See in re Hayhall Trucking, Inc.,* 67 Bankr. 681,684

(Bankr.E.D.Mich. 1986); *See also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

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APPENDIX O

11 U.S.C. Section 506., *Determination of Secured Status,* provides, in relevant part, as follows:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.
>
> (c) The trustee may recover from property securing an allowed secured claim the reasonably, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. Section 503, *Allowance of Administrative Expenses,* provides as follows:

> (a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(6) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph.

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under Section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services other than in a case under this title;

11 U.S.C. Section 1141., *Effect of Confirmation*, provides as follows:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan, bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.